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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1553

JOSEPH GREEN AND FREIGHT LIQUIDATORS, ETC.
Petitioner

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above entitled matter on December 4, 1973, with rehearing denied on January 21, 1974.

CITATIONS TO OPINIONS BELOW

The Opinion of the District of Columbia Court of Appeals, unreported, is attached to this petition.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on December 4, 1973, and an order denying the petition for rehearing and rehearing *en banc* was entered on January 21, 1974, and both are attached to this petition. Jurisdiction of this Court is invoked under Title 28 § 1257 of the United States Code. The District of Columbia Court of Appeals is, by the Court Reorganization Act, now the highest "state court" in the District of Columbia. This final judgment of the District of Columbia Court of Appeals affirming the conviction of petitioner has contravened and misconstrued the Congressional Statute enacted for the District of Columbia, Title 22 § 1411 contrary to Federal law. The decision and opinion of the District of Columbia Court of Appeals has in effect given extra-territorial effect to Title 22 § 1411 of the D.C. Code, and has denied petitioner due process of law under the Fifth and Sixth Amendments to the Constitution.

QUESTIONS PRESENTED

(1) Does not the construction of Title 22 § 1411 of the District of Columbia Code by the District of Columbia Court of Appeals, holding for the first time that an accused could be prosecuted validly under the False Advertising Statute which prohibits the printing or publication of a false advertisement "with intent to sell" even though the petitioner, a non-resident of the District of Columbia, had no retail stores, outlets or wares for sale in the District of Columbia to consummate the sale of the falsely advertised product? Does not this construction do violence to statuory construction, distort the Congressional intent with

respect to the scope of Title 22 § 1411 of the District of Columbia Code, deny the non-resident petitioner due process of law, and in effect give extra-territorial jurisdiction to the District of Columbia statute?

(2) Does not the opinion of the District of Columbia Court of Appeals do violence to the proper construction of the Statute, Title 22 § 1411 in holding that publication of the false advertisement in the Washington Post for a 60-day period constituted a separate offense for each day the advertisement appeared in the Washington Post; and does not the action of the District of Columbia Court of Appeals in affirming the consecutive sentence on all 60 counts for each of the 60 days the advertisement appeared in the paper violate this Court's pronouncement in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, and this Court's ruling and the doctrine of lenity announced by *Ladner* v. *United States*, 358 U.S. 169, 79 S.Ct. 209.

(3) Was not petitioner denied due process of law under the Fifth and Sixth Amendments to the Constitution by the action of the District of Columbia Court of Appeals in affirming the action of the trial judge in signing a written sentence and commitment which varied from the oral sentence imposed in open court and which increased the sentence imposed on the petitioner from that which was orally announced in open court?

STATEMENT OF THE CASE

The petitioner, a retail businessman, with no retail stores, outlets or wares for sale in the District of Columbia, was indicted in the Superior Court of the District of Columbia for the petty offense of false

advertising in violation of Title 22 § 1411 of the District of Columbia Code. The indictment contained 60 counts asserting that the false advertisement was published commencing on February 1, 1972 for a 60-day period with a separate count charged for each day of the 60 days the advertisement appeared in the newspaper which carried through March 31, 1972. The petitioner at the conclusion of the Government's case moved to dismiss and/or consolidate all 60 counts into one count on the theory that if an offense were alleged and proven, only one offense occurred, and that a separate crime did not occur on which a separate sentence could be imposed for each day the advertisement appeared in the newspaper. Petitioner's motions were denied. Petitioner also challenged and moved for a judgment of acquittal at the end of the Government's case contending that the District of Columbia False Advertising Statute, Title 22 § 1411, could not validly be applied to petitioner who owned no retail stores, outlets, or wares for sale in the District of Columbia, but who simply allegedly published or caused to be published a false advertisement in the Washington Post which was published and printed in the District of Columbia. Petitioner urged that since the sale of the falsely advertised product could not take place in the District of Columbia, the record could not sustain a conviction under the False Advertising Statute which required an "intent to sell" in the District of Columbia. Petitioner further urged in the lower court and in the District of Columbia Court of Appeals that if Title 22 § 1411 were to be construed as the Government contended for, namely, that petitioner could be successfully prosecuted for causing a false advertisement to be published in the District of Columbia, and that evidence of intent

to sell could not be sustained and by showing sales outside of the District of Columbia, the court would in effect be giving extra-territorial effect to the local District of Columbia statute. Petitioner asserted that such a construction not only did violence to the reading of the statute, and to the legislative intent behind the statute, which was to punish, simply not false advertising per se, but false advertising with *intent to sell in the District of Columbia;* that it would constitute an unwarranted encroachment on the jurisdiction of the neighboring states, Maryland and Virginia, where the sales in fact occurred.

Petitioner's contentions were denied, although urged at both the trial court and in the District of Columbia Court of Appeals. The opinion of the District of Columbia Court of Appeals does not in fact discuss this central legal issue, except in a brief footnote in the opinion.

The trial judge convicted petitioner on all 60 counts and sentenced in open court petitioner on Counts 1-57, inclusive, and a fine of $400 or 30 days; Counts 58 and 59, a fine of $400 and 30 days, and Count 60, to pay a fine of $400 and 60 days and suspended the imposition of the 60 days.

Contrary to the judge's oral sentence in open court, the Clerk wrote the judgment up inserting the word "each" after each series of counts, so that the written judgment read as follows:

> "The sentence is for each count, one through 57 ($400 each) for 30 days each. Sentence for Counts 58 and 59 is $400 and 30 days each. Sentence for Count 60 is $400 and 60 days suspended. All counts to run consecutively."

The judge's original sentence would have been a fine of $500 and 30 days in jail. Under the language employed by the Clerk (this point was characterized as frivolous by the District of Columbia Court of Appeals), there is a substantial disparity from the sentence orally imposed by the Court in the petitioner's presence, and the written judgment prepared by the Clerk which was a fine of $22,800 or 1,710 days in jail *and* 30 days.

The petitioner also urged at trial and on appeal to the District of Columbia Court of Appeals that if Title 22 § 1411 were to be applied to a non-resident with no retail stores or wares for sale in the District of Columbia the offense of inserting the false advertisement would constitute one offense, and that a consecutive sentence could not be imposed on each day the publication appeared.

All contentions were overruled at the trial court and in the District of Columbia court of appeals, whose opinion is attached. Petitioner for rehearing and rehearing en banc was denied.

STATUTES AND RULES INVOLVED

1. Title 22 § 1411 of the District of Columbia Code.

§22-1411. FRAUDULENT ADVERTISING.

It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver,

exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt, or any security; or with the purpose to deceive, mislead, or induce any person, firm, association, or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead, or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm, association, or corporation so advertising such services. (May 29, 1916, 39 Stat. 165, ch. 130, § 1.)

2. Title 22 § 1412 of the District of Columbia Code.

§22-1412. PROSECUTION UNDER SECTION 22-1411.

Prosecution under section 22-1411 shall be in the Superior Court of the District of Columbia upon information filed by the United States Attorney for the District of Columbia, or one of his assistants. (May 29, 1916, 39 Stat. 165, ch. 130, § 2; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; June 25, 1948, 62 Stat. 909, ch. 646, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, Pub. L. 91-358, title I, § 155(a), 84 Stat. 570.)

3. Title 22 § 1413 of the District of Columbia Code.

§22-1413. PENALTY UNDER SECTION 22-1411.

Any person, firm, or association violating any of the provisions of section 22-1411 shall upon

conviction thereof, be punished by a fine of not more than $500 or by imprisonment of not more than sixty days, or by both fine and imprisonment, in the discretion of the court. A corporation convicted of an offense under the provisions of section 22-1411 shall be fined not more than $500, and its president or other such officials as may be responsible for the conduct and management thereof shall be imprisoned not more than sixty days, in the discretion of the court.

4. Title 10 § 124(a) of the District of Columbia Code.

The Director of Weights, Measures, and Markets is further authorized to make purchases of food in connection with the investigation and detection of sales of food by misrepresentation or false advertising in violation of sections 22-1411 to 22-1413; and there are authorized to be appropriated annually such sums as may be necessary for carrying out the purposes of this section.

5. Rule 43 of the Superior Court of the District of Columbia.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In the prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

6. FIFTH AMENDMENT TO THE CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

7. SIXTH AMENDMENT TO THE CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Opinion Of The D. C. Court of Appeals As The Highest "State" Court For The District Of Columbia Has, In A Case Of First Impression, Misconstrued And Misapplied The Federal Statute, Title 22 § 1411 Of The D. C. Code By Holding That The Petitioner Could Be Successfully Prosecuted For False Advertising With Intent To Sell When Petitioner Had No Stores, Goods Or Merchandise In The District Of Columbia And When All Sales Occurred In Virginia And Maryland.

The decision of the District of Columbia Court of Appeals affirming the conviction of the petitioner in a 60-count indictment for violating Title 22 § 1411 of

the District of Columbia Code misconstrues and misinterprets the Congressional statute, and denies petitioner due process of law in holding that he can be convicted for violating a statute which makes it a crime to publish and print for distribution a false advertisement "with intent to sell" when the petitioner had no stores or wares for sale in the District of Columbia in order to consummate the sale of the falsely advertised product and where all sales were in fact consummated at petitioner's stores in Virginia and Maryland.

It is apparent from a reading of Title 22 § 1411 and its legislative history that when Congress legislated a false advertising statute for the District of Columbia it sought to prevent false advertising in the District of Columbia "with intent to sell, barter or exchange any goods" etc. that the statute was designed to reach advertising which was utilized with "intent to sell" wares, goods, etc. in the District of Columbia.

The pertinent portions of Title 22 § 1411 provide:

> "It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public * * * with *intent to sell, barter* or exchange any goods, wares, or merchandise * * *.

It is clear from the legislative history of the act that Congress was concerned in enacting this statute

with prohibiting false advertising with *intent to sell* in the District of Columbia. Nothing in the language of the act or in its history indicate a legislative intent to prohibit false advertising per se unless accompanied by an *intent to sell in the District of Columbia.* 53 Cong. Rec. 2521; 53 Cong. Rec. 8407.

The pertinent portions of Title 10 § 124(a) of the District of Columbia Code read as follows:

> The Director of Weights, Measures, and Markets is further authorized to make purchases of food in connection with the investigation and detection of sales of food by misrepresentation or false advertising in violation of sections 22-1411 to 22-1413; and there are authorized to be appropriated annually such sums as may be necessary for carrying out the purposes of this section.

Since Title 10 § 124(a) refers specifically to Title 22 § 1411 and Title 22 § 1413 of the District of Columbia Code, it is thus apparent that Congress in appropriating monies to be expended by District employees to *purchase* the goods and wares falsely advertised recognized that *intention to sell in the District of Columbia was the purpose of the statute* and that it *was not designed to cover prosecution for false advertisements published in the District of Columbia with intent to sell said products outside of the District of Columbia with no sales or wares of the falsely advertised products sold or available for sale in the District of Columbia.*

The construction of this statute by the District of Columbia Court of Appeals not only does violence to the ordinary common sense reading of the statute, but in effect has given extra-territorial effect to the District of Columbia statute. Petitioner had no retail

stores or retail outlets in the District of Columbia, and all sales in this regard occurred at stores in Virginia and Maryland. Thus, the publication of the falsely advertised product in the Washington Post newspaper *could not have been with intent to sell in the District of Columbia.* While Title 22 § 1411 does not expressly say that the intent to sell must relate to the District of Columbia, it is certainly implied from the statute. What is implied in a statute is as much a part of it as what is expressed. *United States* v. *Freeman,* 3 Howard 556, 11 L.Ed 724; *Luria* v. *United States,* 231 U.S. 9, L.Ed 101.

In 82 C.J.S. pg. 799 the author states:

> "In other words, in construing the statute consideration may be given to its relation to other statutes, and if reasonably practical, a statute is to be explained in conjunction with other statutes to the end that they may be a harmonious and consistent body of law."

The Government concedes that this is the first prosecution under the statute where the Government has contended that a violation of the false advertising statute occurs when the falsely advertised product is not available in the District of Columbia, but must be purchased in another state. All of the interpretation and enforcement of the statute to the present case *involved products or wares that were not only falsely advertised but were available for sale in the District of Columbia.*

In *Zemel* v. *Rusk,* 381 U.S. 1, 14 L.Ed 2d 179, 85 S.Ct. 1271, this Court stated:

> "Interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of

> construing the statute. Norwegian Nitrogen Product v. United States, 288 U.S. 294, 53 S.Ct. 350; Udal v. Tallmen, 380 U.S. 1, 85 S.Ct. 792.

Since there is nothing in the statute to remotely suggest Congress intended to allow evidence of sales outside the District of Columbia to satisfy the "intent to sell" requirement in the false advertising statute of the District of Columbia, all ambiguities should be resolved in favor of the accused when so construing a criminal statute.

In *United States* v. *Bass,* 404 U.S. 336, 30 L.Ed 488, 92 S.Ct. 515, the court stated:

> First, as we have recently reaffirmed "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Citing Rawls 401 U.S. 808, 28 L.Ed 2d 493, 91 S.Ct. 1056; See, also Ladner v. United States, 358 U.S. 169, 3 L.Ed 2d 199, and Bell v. United States, 349 U.S. 81, 99 L.Ed 904.

In *United States* v. *Alford,* 274 U.S. 264, 71 L.Ed 1040, Mr. Justice Holmes stated:

> "So interpreted, they make better English and better sense * * * it is said that the construction that we adopt has been followed by the Dpt. of Justice and by a number of cases in the District Court ever since the passage of the original act * * * we regard the meaning as too plain to be shaken by the suggestion that criminal statutes are to be construed strictly. They are also to be construed with common sense."

Toussie v. *U.S.,* 397 U.S. 112, 90 S.Ct., 858, the court stated:

> "As we have said before 'when choice has to be made between two readings of what Congress has

made a crime, it is appropriate before we choose the harsher alternative to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.' "

This court has recently reaffirmed this principle in *Huddleston* v. *United States,* No. 72-1076, 42 Law Weekly, 4472, decided March 26, 1974:

> "This rule of narrow constructed is rooted in the concern of the law for individual rights, and in the belief that a fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." *United States* v. *Wiltberger,* 5 Wheat 76 (1820), and *United States* v. *Bass,* 404 U.S. at 348.

The construction and interpretation placed on this statute by the District of Columbia Court of Appeals embracing as it does a prosecution under the False Advertising Statute where none of the wares are for sale and none can be sold in the District of Columbia violates the intent and purpose of the statute which should prompt this Court to grant the petition for writ of certiorari.

II. The Ruling By The District Of Columbia Court Of Appeals That Each Day The False Advertisement Appeared In The Newspaper Constituted A Separate Offense And Its Further Ruling That For Each Day Of The Sixty-Day Period The Advertisement Ran In The Newspaper A Separate Sentence For Each Day All To Run Consecutively Could Legally Be Imposed Is In Violation Of Two Pronouncements Of This Court In United States v. Universal C.I.T. Corp., 344 U.S. 218, 70 S.Ct. 227, And Ladner v. United States, 358 U.S. 169, 79 S.Ct. 209.

Violating all precepts of statutory construction with respect to criminal statutes, the District of Columbia Court of Appeals held that each day the false-

ly advertised product appeared in the paper constituted a separate offense which departed from this Court's precedent above, and justified its holding with the following statement (Tr. 1237-8) and Footnote No. 6:

> "Footnote No. 6: An entire edition of a newspaper, magazine or book should be treated as one publication."
>
> "If we adopt appellant's view, however, that only a course of conduct is proscribed under Title 22 § 1411, we would frustrate rather than effectuate this congressional purpose. Unethical businessmen, for example, would be undeterred from engaging in false advertising in the District of Columbia for prolonged periods of time resulting in thousands of dollars in additional profit, if they knew that a $500 fine was the maximum fine that could be imposed. A $500 fine would then become nothing more than a slight business expense. This is a result Congress obviously did not intent."

The reasoning of the District of Columbia Court of Appeals set forth above authorized not only the proposition that each day the publication appeared in the paper constituted an offense, and that a consecutive sentence could be imposed for each day the article appeared in the paper was specifically justified on the basis that treating the insertion of the false advertisement in the newspaper as a course of conduct and as one offense would result in profit rather in punishment to the offender.

We feel this empirical approach by the District of Columbia Court of Appeals in attempting to determine the intent of Congress by the sentence, the construction would indicate is not only unwarranted,

but on examination is patently specious. Under the ruling of the District of Columbia Court of Appeals a petty offense which carried a maximum fine of $500 and/or up to sixty days could, under the ruling of the District of Columbia Court of Appeals, result in imprisonment for an advertisement that appears in the paper for a sixty-day period, as in this case, for a total of 3,600 days, or slightly less than ten years in the penitentiary. Obviously, Congress never intended such a ridiculous and absurd result. We wish to point out that the District of Columbia Court of Appeals in discussing this issue discounted such a Congressional intent by holding that $500 would be a pittance for an unethical businessman to pay if the court were to construe the unit of prosecution as a course of conduct rather than to construe each day the advertisement appeared in the paper as a separate offense. The District of Columbia Court of Appeals did not allude to the absurd imprisonment that would become possible under the construction adopted by that court. We also wish to point out that the Footnote No. 6 in the opinion, reflected at page 8, illustrates the difficulty and unsoundness of the opinion of the court below. There is nothing in the legislative history of the act or in the act itself to authorize the District of Columbia Court of Appeals to hold as it did in Footnote No. 6:

> "that an entire edition of a newspaper, magazine or book should be treated as one publication."

This Footnote was undoubtedly occasioned by the argument made by the petitioner in the District of Columbia Court of Appeals that if the court were to adopt the trial court's novel interpretation of the

statute, that a separate offense occurred for each day the false advertisement appeared in a newspaper, an absurd result would follow. Since the article appeared for a sixty-day period in the Washington Post which had a circulation of 526,432 newspapers per day, there would have been 31,585,920 offenses committed in the sixty-day period. Faced with this totally absurd result, the District of Columbia Court of Appeals simply announced in their footnote that one edition of the newspaper constituted the measureable unit of prosecution for each day the advertisement ran in the paper.

Congress has never hesitated to specify when it desired each act to be a separate offense in a continuing course of conduct. In the closest analogy to the false advertising statute, we call the Court's attention to Title 15 § 45 of the United States Code dealing with unfair trade practices wherein Congress took pains to point out that each separate violation would constitute a separate offense.

> "* * * Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

This Court in *United States* v. *Universal C.I.T. Corp., supra,* had occasion to deal with this very question in construing an information filed under Sections 15 and 16(a) of the Fair Labor Standards Act. In that case thirty-two counts were filed, six for failure under Section 6 of the Act, 29 U.S.C. § 206 to pay minimum wages, twenty for violation of the overtime provisions of Section 7, 29 U.S.C. § 207; and six

for failure to comply with the requirement for record keeping under Section 11.

> "This district judge was therefore correct in rejecting the Government's construction of the statute. The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from the singleness of thought, purpose or action, which may be deemed a single 'impulse' a conception recognized by this Court in the Blockburger Case, supra, quoting Wharton, Criminal Law 11th ed. § 34. Merely to illustrate, without attempting to rule on specific situations: a wholly unjustifiable managerial decision that a certain activity was not work and therefore did not require compensation under F.L.S.A. standards cannot be turned into a multiplicity of offenses by considering each underpayment in a single week or to a single employee as a separate offense."

The opinion of the District of Columbia Court of Appeals recognizes the ambiguity in the statute, and yet, faced with that reality did not follow this Court's pronouncement in *Ladner* v. *United States, supra,* wherein this Court held that the rule of lenity should be followed when there is unequivocal or unclear meaning concerning the construction of a statute. Speaking through Mr. Justice Brennan, this Court stated:

> "And in Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.3d 905, the Court expressed this policy as follows: 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. See also Prince v. United States, supra; Gore v. United

> States, 356 U.S. 386, 391, 78 S.Ct., 1280, 1283, 2 L.Ed 2d 1405. This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation of § 254."

In United States v. Lewis, 435 F.2d 147, the United States Court of Appeals for the District of Columbia Circuit in construing this Court's ruling in *Ladner* v. *United States, supra,* stated:

> "The rule of lenity is a part of Congressional purpose, and the court rejects 'fragmentation of crime for purposes of punishment and pyramiding of penalties unless this is otherwise shown to reflect Congressional intent.'" Prince v. United States 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed 2nd 370 (1970).

In Wright's Federal Practice § 527 the author states:

> "It is, of course, often difficult to determine whether one offense or several are created. Here the extent of Congress is controlling, and since Congress can readily make its will clear if it desires to create distinctive offenses in case of doubt the court follows a policy of lenity and assumes that only one crime is involved."

In light of the obvious confusion, ambiguity and misinterpretation involved in the statute with respect

to the unit of prosecution, even if the District of Columbia Court of Appeals were correct in their construction of the statute, they failed to follow the rule of lenity announced by this Court in *Ladner* v. *United States, supra,* by failing to prohibit the imposition of consecutive sentences on the petitioner for each day during the 60-day period that the allegedly false advertisement appeared in the newspaper. This court should grant the petition for a writ of certiorari.

III. The Petitioner Was Denied Due Process Of Law Under The Fifth and Sixth Amendments To The Constitution When The Trial Judge Signed A Written Judgment And Sentence Which Departed From The Oral Sentence Imposed On Petitioner In Open Court And Which Increased The Sentence That Was Imposed Upon Him In Open Court.

In open court in the presence of his counsel the court sentenced the petitioner as follows:

> THE COURT: All right. Mr. Green, sentence in this case is—there are sixty counts—in Counts *1 through 57, inclusive,* you have to pay a fine of Four Hundred Dollars or thirty days. In Counts 58 and 59 you have to pay a fine of Four Hundred Dollars and serve thirty days. In Count 60 you have to pay a fine of Four Hundred Dollars and sixty days. The Court will suspend the imprisonment in the last count, that is, the sixty days. The rest of the sentence is consecutive. The Court will, of course, allow counsel time to file a notice of appeal within ten days. Are you ready now?
>
> MR. AHERN: Yes, Your Honor. I couldn't really follow that sentencing, though, for this judgment, but I do want to file a notice of appeal, Your Honor.
>
> THE COURT: I will go on. You may either file notice of appeal or present your client to serve

sentence on Monday, November 6th. I will repeat to you: In Counts 1 through 57, Four Hundred Dollars or thirty days, Counts 58 and 59; Four Hundred Dollars and thirty days; last count, Four Hundred Dollars and sixty days; all counts to run consecutive, the last sixty days is suspended. All right, Mr. Green, you are free to go with your attorney. He will advise you of your legal rights from here on. Thank you Mr. Ahern.

MR. AHERN: Your Honor, we will file notice of appeal. If you will allow personal bond pending appeal.

THE COURT: I will allow his bond to remain pending appeal. Thank you, gentlemen. (Tr. Oct. 27, 1972, pg. 6-7).

Thereafter, outside the presence of the petitioner the court signed a written judgment and sentence in which the word "each" was inserted throughout and which read as follows:

"Sentence is for *each* count one through fifty-seven (Four Hundred Dollars Each) or thirty days each. Sentence for counts fifty-eight and fifty-nine is Four Hundred Dollars and thirty days *each*. The sentence for count sixty is Four Hundred Dollars and sixty days suspended. All counts to run consecutively. The Court instructs the defendant that he must either surrender himself or file a notice of appeal no later than November 6, 1972. The defendant remains on bond until November 6, 1972."

In normal usage of the English language which we feel trial judges should at least be held to when imposing a sentence in a criminal case while there is some difference in verbage in the trial judge's oral sentence he imposed upon petitioner and his purported

clarification in open court of his statement, there is a distinct difference between both oral pronouncements in open court and the written judgment signed by the court later. Under the oral sentence imposed on the petitioner and the court in the presence of the petitioner divided the sixty counts into three groups. The first group was Counts 1 through 57, inclusive—fine of $400 or thirty days; the second group was Counts 58 and 59, fine of $400 and thirty days; the third group was Count 60—fine of $400 and sixty—sixty days suspended.

The court then stated, "the rest of the sentence is consecutive." His later clarification in open court referred to above, after using the same grouping, namely, counts 1-57; Counts 58 and 59; and Count 60, then stated, "all counts to run consecutive, the last sixty days is suspended."

While it may be argued that there is some variance between the two statements of the trial judge purporting to sentence petitioner, it is very apparent from both statements that Counts 1-57, inclusive, were considered as one group, no-where does the word "each" appear in either the original sentence or in the purported clarification of that sentence in open court. In the sentence imposed upon the petitioner in open court, Counts 1-57 inclusive, the fine is $400 or thirty days. In the written judgment as signed by the court with the word "each" added, the fine is $22,800 or 1,710 days in jail. In the oral sentence imposed upon petitioner in open court in Counts 58 and 59 he was sentenced to pay a fine of $400 and serve thirty days. In the written judgment entered outside the presence of petitioner, by adding the word "each" the sentence is $800.00 and 60 days.

The District of Columbia Court of Appeals has disposed of this serious issue involving a substantial variance from the judge's oral sentence and the written judgment signed by him with footnote No. 2 of the opinion holding that the point is frivolous because the court did state at one point "all counts to run consecutively." The opinion of the court below failed utterly to discuss the conflict in the two oral statements made by the trial judge when sentence was imposed and the trial judge in his sentence in oral court grouped all counts into three groups and obviously spoke of Counts 1-57 as one group or one entity. The written judgment entered outside petitioner's presence ends up with the absurd result of having petitioner sentenced to over five years in jail on a petty offense and/or a $22,800 fine which is all accomplished by the insertion of the word "each" in the written judgment.

The decision in this case is in flat conflict with other Circuit Court decisions holding that the oral sentence in open court takes precidence over any variation in the written judgment and committment.

The ruling in this case denied petitioner due process of law under the Sixth Amendment since he was entitled to counsel at all stages in the criminal proceedings, and what is more critical and important than the imospition of sentence. This Court in *United States* v. *Daugherty*, 269 U.S. 360, 46 S.Ct. 156 the Supreme Court stated:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapplication by those who must execute them."

In *Henley* v. *Heritage*, 337 F.2d 847, (5th Cir. 1964) the Court stated:

> "Since we hold that the orally pronounced sentence adequately indicated the sentence sequence, it is of no consequence that the judgment and commitments were ambiguous in this regard. Rule 43, F.R. Crim.P., requires that the defendant be present when sentence is announced by the court, and Rule 32(b) requires that the judgment of conviction shall set forth the sentence. It follows that where there is a discrepancy between the oral pronouncement and the written judgment and commitment, the former must control. See Kennedy v. Reid, 1957, 101 U.S. App. D.C. 400, 249 F.2d 492; Payne v. Madigan, 9th Cir., 1960, 274 F.2d 702 aff'd by an equally divided court, 1961, 366 U.S. 761, 81 S.Ct. 1670, 6 L.Ed 2d 853. See also our recent case of Paccione v. Heritage, 5 Cir., 1963, 323 F.2d 378, cert. denied."

In *Kennedy* v. *Reid*, 249 F.2d 492 (D.C. Cir.) the court stated:

> "The pronouncement of sentence constitutes the judgment of the Court. See also, Pollard v. U.S., 352, U.S. 354, and Walden v. Hudspeth, 115 F.2d 558.

The Superior Court has a local criminal rule 43 which is virtually identical to Rule 43 of the Rules of Federal Criminal Procedure and which is set forth in the Appendix. It is identical to the federal rule insofar as guaranteeing the accused's presence at the time of sentence. We suggest to this court that the sentence imposed by the trial court in open court, even if equivocal, cannot be corrected and made more clear by the Clerk in preparing the written judgment

of sentence and commitment for the court to sign. We submit that the written judgment of commitment and sentence in this case, which increased the sentence of the petitioner from a fine of $400 and thirty days to a fine of $22,800 or 1,710 days in jail, and sixty days in jail. This action denied petitioner due process of law under the Fifth and Sixth Amendments to the Constitution, and is in sharp conflict with the decisions in the other circuit courts of appeal which have construed rule 43 of the Rules of Federal Criminal Procedure in cases where the written sentence has varied from the oral sentence pronounced on the accused in open court. This court should grant the petition for certiorari.

CONCLUSION

This is a case of first impression insofar as it concerns the construction and interpretation of Title 22 § 1411 of the District of Columbia Code known as the false advertising statute. The ruling sustained by the District of Columbia Court of Appeals affirming the conviction of the petitioner for false advertising when he operated no stores in the District of Columbia, distributed no merchandise in the District of Columbia, and had no wares for sale in the District of Columbia, including the goods allegedly falsely advertised, constitutes a gross misinterpretation of the legislative intent of the statute and denied petitioner due process of law.

Assuming, arguendo, that the District of Columbia Court of Appeals correctly held that the false advertising statute could apply to the petitioner, a nonresident with no goods or wares for sale in the D. of C. it violated this Court's pronouncement in *United*

States v. *Universal C.I.T. Corp, supra,* and *Ladner* v. *United, supra,* when it held that each day the false advertisement appeared in the paper constituted a separate offense, and when it refused to apply to rule of lenity and held that a consecutive sentence should be imposed on each count representing each day during the 60-day period the false advertisement appeared in the paper.

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041
Attorney for Petitioner

Of Counsel:

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1735 New York Avenue, N.W.
Washington, D. C. 20006

APPENDIX

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7019

JOSEPH GREEN

and

FREIGHT LIQUIDATORS OF
7849 Eastern Avenue,
Silver Spring, Maryland, et al., APPELLANTS,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued September 18, 1973 Decided December 4, 1973)

Albert J. Ahern, Jr., for appellants.

Peter K. Mair, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry, Seymour Glanzer* and *Julian S. Greenspun*, Assistant United States Attorneys, were on the brief, for appellee.

Before KELLY, FICKLING and KERN, Associate Judges.

FICKLING, *Associate Judge:* Appellant Joseph Green was charged in a sixty-count indictment with violating D.C. Code 1973, § 22-1411 (publishing fraudulent advertising in the District of Columbia).[1] In a nonjury trial,

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[1] D.C. Code 1973, § 22-1411, provides in pertinent part:

Fraudulent advertising.

It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted

he was found guilty as charged. He was sentenced for counts 1 to 57 to a $400 fine or 30 days incarceration on each count; for counts 58 and 59, to a $400 fine and 30 days on each count; for count 60, to a fine of $400 and a 60-day suspended sentence. All counts were consecutive.

On appeal the only issues meriting discussion are (1) whether the evidence supported the trial court's finding that appellant caused the advertisements complained of to be inserted in the Washington Post newspaper, and (2) whether the trial court erred in treating each daily

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in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything else of value. . . .

D.C. Code 1973, § 22-1412, provides:

Prosecution under section 22-1411.

Prosecution under section 22-1411 shall be in the Superior Court of the District of Columbia upon information filed by the United States Attorney for the District of Columbia, or one of his assistants.

And D.C. Code 1973, § 22-1413, provides:

Penalty under section 22-1411.

Any person, firm, or association violating any of the provisions of section 22-1411 shall upon conviction thereof, be punished by a fine or not more than $500 or by imprisonment of not more than sixty days, or by both fine and imprisonment, in the discretion of the court. A corporation convicted of an offense under the provisions of section 22-1411 shall be fined not more than $500, and its president or such other officials as may be responsible for the conduct and management thereof shall be imprisoned not more than sixty days, in the discretion of the court.

publication of the false advertisement during the 60-day period as a separate offense.[2] We affrm.

Appellant is a partner in a group of retail stores located in the Virginia and Maryland suburbs of tht District of Columbia that conduct business under the name of "Freight Liquidators." At a hearing before the Federal Trade Commission, he explained his role in this business operation[3] as follows: That although he aids his partners in the hiring and training of store personnel, his main function is simply advertising and buying; and that his partners rely on his decisions in the merchandising area because he is more familiar with the local and federal statutes and therefore less likely to run afoul of the law.

The advertisement in question was placed in the Washington Post from February 1 through March 3, 1972. It stated in material part:

> SEWING MACHINES
> TRUCKLOAD LIQUIDATION
> ONLY $63
> FINAL NOTICE
> BRAND NEW
>
> (1972) Automatic "Touch-N-Stitch" zigzag sewing machines that do buttonholes, stretch-stitch, embroi-

---

[2] The contentions that the trial court lacked jurisdiction and that it was error to proceed by way of indictment are without merit. *See* D.C. Code 1973, § 22-1412 and Super. Ct. Crim. R. 7. The contention that the sentence provided for in the written judgment was invalid because the trial court, in its oral pronouncement of sentence, did not use the words "for each" count is frivolous since the court did state orally "all counts to run consecutive[ly]." Finally, we find no abuse of discretion in permitting several of appellant's customers to testify that they bought sewing machine models other than the one advertised.

[3] Portions of appellant's testimony before the Federal Trade Commission were introduced into evidence during the trial. No objection was made by appellant.

der, monograms, applique, etc. All without attachments.

These machines originally sold for $219, carry a 25-year guar. & free instructions & will be released on a first come, first serve basis. Available in portable or console. Terms arranged, check, cash or charge card is acceptable. Call first to see if any left.

FREIGHT
LIQUIDATORS

[Hereinafter were listed the retail store addresses and telephone numbers in the Washington area.][4]

At trial the government called several consumer-witnesses. Their uncontroverted testimony was that in response to this advertisement they went to various Freight Liquidators stores expecting to buy an operable sewing machine for $63. To their chagrin, however, they found that only the "head"—that is, the motor and needle apparatus of a complete sewing machine—was tendered for sale and that the base and the foot pedal, needed to turn the machine on and off and to regulate the speed of the motor, had to be obtained at additional cost.

The government also offered all of appellant's grand jury testimony into evidence. Appellant had voluntarily appeared before the grand jury to demonstrate and explain the operation of the head part of the sewing machine without the base and the foot pedal.[5] At one point during the demonstration, an odor pervaded the grand jury room; appellant stated the motor was overheating and conceded

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[4] Counsel for appellant and the government stipulated that this advertisement was the same in all material respects as the advertisement which ran in the Washington Post during the sixty dates listed in the indictment. It was also stipulated by the parties that the Washington Post was a daily newspaper printed and distributed in the District of Columbia.

[5] Prior to his testimony appellant was advised of his Fifth and Sixth Amendment rights.

that the operation of the head in the manner was neither good for the longevity of the motor, nor was it a use contemplated by the manufacturer. Appellant acknowledged responsibility for the advertising in question. In addition he stated "that since we've been notified to come down here, we do not advertise the machine head only."

In defense appellant called a Florida retailer who had been selling sewing machines for over 17 years. He testified that his purpose in coming to Washington was to observe appellant's merchandising techniques because he was "buying a lot more than me and I wanted to see how he's doing it." During cross-examination he stated that the sewing machine should not be operated without the base and the foot pedal. Another defense witness testified that approximately 6 percent of Freight Liquidators' sales during the two-month period in question was heads only. Appellant elected not to testify in his own behalf.

In a written opinion the trial judge held that the government had proved beyond a reasonable doubt that appellant had violated the statute forbidding false advertising. The trial court found that during the period alleged, appellant had knowingly caused certain advertisements to be inserted into the Washington Post; that these advertisements were false and misleading because they purported to offer for sale a complete sewing machine unit, although no such unit was tendered for purchase at the advertised price; that he utilized such false advertising with intent to sell certain goods to the public; and that he did all the above acts purposefully, deliberately, and intentionally.

Appellant's claim that the evidence was insufficient to support the finding that he caused the advertisements to be inserted in the Washington Post is without merit.

As we stated in *Kenhan* v. *United States*, D.C.App., 263 A.2d 253, 254 (1970):

> It hardly need be said that the finder of fact—here, the court—has the function of determining the credi-

> bility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences from the proven facts. And we will not reverse a conviction on the facts as long as there is evidence which reasonably permits a finding of guilt. . . .

Accord, Patterson v. *United States*, D.C.App., 301 A.2d 67, 68 (1973); *In re J.N.H.*, D.C.App., 293 A.2d 878, 880 (1972); *Porter* v. *United States*, D.C.App., 282 A.2d 559, 560 (1971).

In the instant case it is true that the government did not produce business records from the newspaper involved. Nevertheless, appellant admitted in a hearing before the Federal Trade Commission that he was in charge of the advertising in his business. More importantly, before the grand jury he acknowledged his responsibility for the advertisements in question. Appellant's own witness, a Florida retailer, testified that he came to Washington to observe appellant's merchandising techniques. We are of the view that from these facts it may be reasonably inferred that appellant caused the advertising to be put into the Washington Post.

We also reject appellant's contention that there were not sixty offenses committed here but only one, because a course of conduct rather than the separate acts in such a course constitutes the conduct punishable under § 22-1411. Upon examination of both the legislative history and the statute, we find no reason for concluding that Congress intended to punish only a course of conduct.

Congress passed § 22-1411 with the intended purpose of preventing the dissemination of false advertising in the District of Columbia. In the accompanying House Report on the bill, the Committee on the District of Columbia stated "[i]t is believed that the title of the bill is sufficient to state the purpose of it without further comment," H.R. REP. No. 169, 64h Cong., 1st Sess. 39 (1916), and the bill

was entitled an act "to prevent fraudulent advertising in the District of Columbia."

If we adopt appellant's view, however, that only a course of conduct is proscribed under § 22-1411, we would frustrate rather than effectuate this congressional purpose. Unethical businessmen, for example, would be undeterred from engaging in false advertising in the District of Columbia for prolonged periods of time resulting in thousands of dollars in additional profit, if they knew that $500 was the maximum fine that could be imposed. A $500 fine would then become nothing more than a slight business expense. This is a result Congress obviously did not intend.

In addition, the language of § 22-1411 unambiguously prohibits each display of false advertising. Section 22-1411 provides:

> It shall be unlawful . . . to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia . . . *any false, untrue, or misleading statement, representation, or advertisement* with intent to sell, barter, or exchange any goods, wares, or merchandise. . . . [Emphasis added.]

There is nothing in the language of § 22-1411 that speaks of a course of conduct. If Congress had intended to punish one for merely engaging in false advertising, it would have expressly so stated. It is apparent therefore, in view of the purpose and plain language of § 22-1411, that Congress intended to punish each publication[6] of a false advertisement. Accordingly, we hold that the trial court properly treated each daily publication of the false advertisement during the 60-day period as a separate offense.

Affirmed.

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[6] An entire edition of a newspaper, magazine, or book should be treated as one publication.

SUPERIOR COURT
OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in or June 6, 1972
Criminal Case No. 34750-72
Grand Jury No. Original
Violations: 22 D.C. Code § 1411 (False Advertising)

United States of America
v.
Joseph Green;
Freight Liquidators of
7849 Eastern Avenue; Silver Spring, Maryland;
Freight Liquidators of
5552 Kenilworth Avenue; Riverdale, Maryland;
Freight Liquidators of
4801 Suitland Road; Suitland, Maryland;
Freight Liquidators of
8655 Richmond Highway; Alexandria, Virginia;
Freight Liquidators of
4689 King Street; Arlington, Virginia;
Freight Liquidators of
1065 West Broad Street; Falls Church, Virginia;
Freight Liquidators of
1727 Wilson Boulevard; Arlington, Virginia

The Grand Jury charges:

1. At all times material herein, Joseph Green a defendant herein, owned and exercised control directly and indirectly over a chain of retail stores in the Washington Metropolitan area, which stores traded in the name of Freight Liquidators.

2. At all times material herein Freight Liquidators of 7849 Eastern Avenue, Silver Spring, Maryland, of 5552 Kenilworth Avenue, Riverdale, Maryland, of 4801 Suitland Road, Suitland, Maryland, of 8655 Richmond Highway, Alexandria, Virginia, of 4689 King Street, Baileys Cross Roads, Virginia, of 1065 West Broad Street, Falls

Church, Virginia, of 1727 Wilson Boulevard, Arlington, Virginia, all of whom are defendants herein, were operating individually as partnerships and are hereinafter collectively referred to as "Freight Liquidators."

3. At all times material herein, each Freight Liquidators partnership was owned and controlled by Joseph Green.

4. At all times material herein, Freight Liquidators by newspaper, radio and television advertising offered for sale to the public in the District of Columbia and elsewhere, sewing machines, "stereos," televisions and other merchandise.

5. From on or about February 1, 1972 to March 28, 1972 inclusive, Joseph Green and Freight Liquidators caused advertisements to be published in the Washington Post, a newspaper printed and published in the District of Columbia, which were false, untrue and misleading in the following respects:

(a) That the 1972 touch-n-stitch sewing machine was for sale at $63.00.

(b) They omitted to state that a base and operating pedal, which were necessary for the normal and prescribed usage of the 1972 touch-n-stitch sewing machine were not included in the advertised price of $63.00, but were only furnished for an additional cost.

(c) That the 1972 touch-n-stitch sewing machine was guaranteed for 25 years.

(d) They omitted to state that the 25 year guarantee which was offered with the sale of the 1972 touch-n-stitch sewing machine did not apply to many of the integral parts thereof.

(e) That the 1972 touch-n-stitch sewing machine which Freight Liquidators offered for sale for $63.00, originally sold for $219.00.

(f) They contained such phrases as "Public Notice," "Freight Liquidators," "call first to see if any

left," "Four days only," and "factory and mill close-outs," when in truth and in fact, and as the defendants well knew, the items offered for sale were not the final stock or inventory of the manufacturer thereof, nor were they unclaimed freight or the subject of an auction.

COUNTS 1 THROUGH 60

On or about the dates hereinafter specified for each count, Joseph W. Green and each of the Freight Liquidators' partnerships enumerated in paragraph 1 of this indictment, with the intent to sell merchandise, caused advertisements to be published in the Washington Post, a newspaper printed and distributed in the District of Columbia, which advertisements were false, untrue and misleading in various respects, including those set forth in paragraph four (4) of this indictment, as follows:

COUNT	DATE OF PUBLICATION
1	February 1, 1972
2	February 2, 1972
3	February 3, 1972
4	February 4, 1972
5	February 5, 1972
6	February 6, 1972
7	February 7, 1972
8	February 8, 1972
9	February 9, 1972
10	February 10, 1972
11	February 11, 1972
12	February 12, 1972
13	February 13, 1972
14	February 14, 1972
15	February 15, 1972
16	February 16, 1972
17	February 17, 1972
18	February 18, 1972
19	February 19, 1972
20	February 20, 1972
21	February 21, 1972
22	February 22, 1972

COUNT	DATE OF PUBLICATION
23	February 23, 1972
24	February 24, 1972
25	February 25, 1972
26	February 26, 1972
27	February 27, 1972
28	February 28, 1972
29	February 29, 1972
30	March 1, 1972
31	March 2, 1972
32	March 3, 1972
33	March 4, 1972
34	March 5, 1972
35	March 6, 1972
36	March 7, 1972
37	March 8, 1972
38	March 9, 1972
39	March 10, 1972
40	March 11, 1972
41	March 12, 1972
42	March 13, 1972
43	March 14, 1972
44	March 15, 1972
45	March 16, 1972
46	March 17, 1972
47	March 18, 1972
48	March 19, 1972
49	March 20, 1972
50	March 21, 1972
51	March 22, 1972
52	March 23, 1972
53	March 24, 1972
54	March 25, 1972
55	March 26, 1972
56	March 27, 1972
57	March 28, 1972
58	March 29, 1972
59	March 30, 1972
60	March 31, 1972

(Violations: 22 D.C. Code § 1411)

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1974

No. 7019

JOSEPH GREEN and
FREIGHT LIQUIDATORS, et al.,
Appellants,
34750-72-A thru BH
v.
UNITED STATES,
Appellee.

BEFORE: Kelly, Fickling and Kern, Associate Judges.

Order

(Filed Jan. 21, 1974)

On consideration of appellants' petition for rehearing, it is

ORDERED that appellants' petition is denied.

PER CURIAM.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1553

JOSEPH GREEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a nonjury trial in the Superior Court for the District of Columbia, petitioner[1] was convicted on 60 counts of fraudulent advertising in the District, in violation of 22 D.C. Code 1411. He was sentenced on each of Counts 1 through 57 either to pay a fine of $400 or to serve a term of imprisonment for 30 days; on Counts 58 and 59, to a fine of $400 and 30 days on each count; and, on Count 60, to a fine of $400 and a suspended sentence of 60 days. The District of Columbia Court of Appeals affirmed (Pet. App. 1a-7a; 312 A. 2d 788).

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[1]Although the caption refers to all defendants below as petitioners, the issues raised on appeal and in the petition involve only petitioner Green, who was the only defendant upon whom sentence was imposed, the other defendants being essentially trade names for petitioner Green. Accordingly, we shall refer only to petitioner Green.

A petition for rehearing was denied on January 21, 1974 (Pet. App. 12a). The petition for a writ of certiorari was filed on April 16, 1974. See 28U.S.C.2101(d), 2113; Rule 22(1) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The facts are set forth in detail in the opinions of the Superior Court (App., *infra)* and of the Court of Appeals (Pet. App. 3a-5a), and are not in dispute. Petitioner inserted the advertisement in question in each day's edition of the *Washington Post* from February 1 through March 31, 1972, a total of 60 insertions of the advertisement. It stated that "Touch-N-Stitch" sewing machines were available for $63 at petitioner's place of business, "Freight Liquidators." At trial the government called several consumer witnesses. They testified that in response to this advertisement they had gone, for example, from their homes in the District of Columbia to petitioner's stores across the District line on Eastern Avenue in Silver Spring, Maryland, expecting to buy an operable sewing machine for $63, but had found that only the "head," *i.e.*, the motor and needle apparatus of a complete sewing machine, was available at that price and that the base and the foot pedal, needed to turn the machine on and off and to regulate the speed of the motor, could be obtained only at substantial additional expense.

The government also introduced in evidence the transcript of petitioner's voluntary grand jury testimony, during which he demonstrated and explained the operation of the head part of the sewing machine without the base and the foot pedal. At one point during the demonstration, when an odor pervaded the grand jury room, petitioner stated that the motor was overheating and conceded that the operation of the head in that manner was not good for the life of the motor, nor was

it a use contemplated by the manufacturer. Petitioner acknowledged responsibility for the advertising in question. In addition, he stated "that since we've been notified to come down here, we do not advertise the machine head only."

Petitioner did not testify at his trial. In his defense he called a Florida retailer who stated that he had travelled to Washington to observe petitioner's marketing techniques. During cross-examination the retailer stated that the sewing machine should not be operated without the base and foot pedal. Another defense witness testified that approximately 6 percent of petitioner's sales of sewing machines during the two-month period in question involved only heads.

1. The petition presents no question of national significance or general importance warranting a departure from this Court's traditional policy of not reviewing decisions of the highest court in the District of Columbia. *E.g., Del Vecchio* v. *Bowers*, 296 U.S. 280, 285. Rather, the case involves primarily the application of a provision of the District of Columbia Code to a particular set of facts. In any event, the court of appeals' decision was correct and is not in conflict with any decisions of this Court.

2. Petitioner's primary contention is that 22 D.C. Code 1411 reaches false advertising in the District of Columbia only if the advertiser also operates and sells the advertised goods in the District. However, neither the language of the statute nor its legislative history supports any such narrow interpretation, which would permit sellers of goods freely to flood the District with false advertisements and to victimize District residents, so long as the sale technically occurred beyond the District line.

Although Section 1411 specifically requires that the insertion of the advertisement in a newspaper be done directly or indirectly "in the District of Columbia" and that the newspaper be printed "in the District of Columbia," it does not require that the advertisement involve the sale of goods only in the District. Nor does the legislative history of the statute justify reading into it the territorial limitation petitioner proposes. There is no suggestion of a limitation to false advertisements for sales of goods only in the District.[2] On the contrary, the history shows that the provision of Section 1411 under which petitioner was convicted was "intended to punish the dissemination of fraudulent advertisements to the public * * * " (H. Rep. No. 169, 64th Cong., 1st Sess., p. 1), rather than the actual sale of goods resulting from such advertisements, and that Congress apparently anticipated that Section 1411 would apply to advertisements for matters likely to be sold outside the District. See generally *ibid.*; 53 Cong. Rec. 2521-2522.[3]

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[2] The intention of Congress in enacting Section 1411 in 1916 is in no way illuminated by its enactment in 1945 of a statute, on which petitioner relies (Pet. 11), authorizing the District government's Director of Weights, Measures, and Markets to purchase food in connection with the investigation and detection of sales of food by false advertising in violation of Section 1411. See 10 D.C. Code 124a. That statute did not reflect an attempt to be coextensive with Section 1411 and did not explicitly limit the Director to making purchases in the District.

[3] For example, when asked during the House debates whether Section 1411 would protect against advertisements for fake land schemes and mining stock, the draftsman of the bill, Representative Johnson, responded that its purpose was "to protect the public from false advertisements relating to any character of property through which the public was being robbed." 53 Cong. Rec. 2521.

Petitioner's argument based on the assertion that Section 1411 has not previously been enforced when the falsely advertised product could be purchased only outside the District is foreclosed by this Court's unanimous decision in *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100. There this Court held that a prosecution for violation of a regulation enacted by the short-lived Legislative Assembly of the District of Columbia in 1873 was not barred by the fact that the regulation had never been enforced and had arguably been repealed in 1901. As this Court observed, "[t]he failure of the executive branch to enforce a law does not result in its modification * * *." *Id.* at 113-114; see *id.* at 117.

3. Petitioner's contention that Sections 1411 and 1413 permit the imposition of only a single penalty upon his "course of conduct" was specifically considered and correctly rejected by the court of appeals (Pet. App. 6a-7a; footnote omitted):

> We also reject appellant's contention that there were not sixty offenses committed here but only one, because a course of conduct rather than the separate acts in such a course constitutes the conduct punishable under § 22-1411. Upon examination of both the legislative history and the statute, we find no reason for concluding that Congress intended to punish only a course of conduct.
>
> Congress passed § 22-1411 with the intended purpose of preventing the dissemination of false advertising in the District of Columbia. In the accompanying House Report on the bill, the Committee on the District of Columbia stated "[i]t is believed that the title of the bill is sufficient to state the purpose of it without further comment," H.R. Rep. No. 169, 64th Cong., 1st Sess. 39 (1916), and the bill was entitled an act "to prevent fraudulent advertising in the District of Columbia."

If we adopt appellant's view, however, that only a course of conduct is proscribed under § 22-1411, we would frustrate rather than effectuate this congressional purpose. Unethical businessmen, for example, would be undeterred from engaging in false advertising in the District of Columbia for prolonged periods of time resulting in thousands of dollars in additional profit, if they knew that $500 was the maximum fine that could be imposed. A $500 fine would then become nothing more than a slight business expense. This is a result Congress obviously did not intend.

In addition, the language of § 22-1411 unambiguously prohibits each display of false advertising. § 22-1411 provides:

> It shall be unlawful . . . to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia . . . *any false, untrue, or misleading statement, representation, or advertisement* with intent to sell, barter, or exchange any goods, wares, or merchandise . . . .[Emphasis added.]

There is nothing in the language of Section 1411 that speaks of a course of conduct. If Congress had intended to punish one for merely engaging in false advertising, it would have expressly so stated. It is apparent therefore, in view of the purpose and plain language of § 22-1411, that Congress intended to punish each publication of a false advertisement * * * [4]

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[4] Petitioner's speculations (Pet. 16-17) about the significance of a footnote in which the court of appeals observed that "[a]n entire edition of a newspaper, magazine, or book should be treated as one publication" (Pet. App. 7a, n.6), are beside the point, as here there has been no attempt to treat each copy of each day's newspaper as a separate publication. It is, in any event, the *insertion* of the false advertisement that is an offense, and each day's printing of a newspaper, would involve but a single insertion, regardless of the number of copies involved.

Petitioner's reliance (Pet. 17-20) upon this Court's decisions in *Ladner* v. *United States*, 358 U.S. 169, and *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 is misplaced, for both cases involved the application of significantly different statutory prohibitions to factual situations having no pertinent resemblance to the instant case.[5]

Petitioner cites (Pet. 17) the provision in 15 U.S.C. 45 that "[e]ach separate violation" of a final order of the Federal Trade Commission is a separate offense, and that each day of violation "through continuing failure or neglect to obey" such order itself is a separate offense. That provision was intended to permit a separate civil penalty for each day of noncompliance with a Commission order, where the noncompliance resulted from a single act or a continuous course of conduct. It was not intended to permit only a single penalty for a series of

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[5]In *Ladner*, after analyzing the particular language and legislative history of the predecessor of 18 U.S.C. 111, which prohibited assault of or interference with federal officers in the performance of their duties, this Court concluded that the statute was ambiguous as to whether the unit of prosecution intended by Congress was the act of assault or interference, or the number of officers affected. 358 U.S. at 173-177. Applying the rule of lenity, this Court held that the act of firing a single gunshot constituted only a single violation, even though two officers were wounded by the shot. *Id.* at 177-178. In *Universal C.I.T.*, this Court held that, in view of (1) ambiguity as to whether the Fair Labor Standards Act (52 Stat. 1068, 1069, as amended, 29 U.S.C. 215, 216(a)) imposed criminal sanctions on the basis of each employee as to whom there was a violation, rather than the employer's course of conduct in mispaying a number of employees at the same time, and (2) legislative history showing that a proposal to impose criminal sanctions upon the former basis had been specifically rejected, the Act should be construed as penalizing only a course of conduct. 344 U.S. at 222-224. Here there is neither ambiguity nor legislative history favoring petitioner's construction of Section 1411.

separate violations of a Commission order.[6] In any event, the provision has no bearing on this case, where petitioner was not subjected to civil penalties, but to fines as punishment for multiple violations of a criminal statute.

4. The court of appeals did not err in failing to apply the rule of lenity used in construing federal criminal statutes (see Pet. 13-14, 19-20), assuming that that rule of construction still governs this Court's consideration of District of Columbia statutes that have been authoritatively construed by the highest court in the District of Columbia. Cf. 28 U.S.C. 1363; *Palmore* v. *United States*, 411 U.S. 389. Here, as in *Huddleston* v. *United States*, No. 72-1076, decided March 26, 1974, there is "no grievous ambiguity or uncertainty in the language and structure of" Section 1411; it "clearly proscribes petitioner's conduct and accorded him fair warning of the sanctions the law placed on that conduct." Slip op. p. 17.

5. Petitioner's final contention, that there was a material discrepancy between the court's oral sentence and that contained in the judgment subsequently entered (Pet. 20-25), is without merit. The court's oral judgment (quoted at Pet. 20-21) explicitly provided that, except for the suspended sentence on Count 60, "the rest of the sentence is consecutive" and "all counts [are] to run consecutive * * *." Accordingly, in imposing the specified sentence on "each count," with "[a]ll sentences to run consecutively," the judgment did not depart from the sentence pronounced in petitioner's presence.

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[6]Thus, the legislative history of the "continuing" penalty provision shows that under prior law one who violated an FTC order barring false advertising by engaging in a campaign of daily radio broadcasts would be subject to civil penalties of up to $5,000 for each day's advertisement, whereas one who violated an order by advertising on a billboard for a continuous period of time might be subject to only a single penalty. The "continuing" penalty amendment added in 1950 (64 Stat. 20) made daily penalties available in the latter situation. 96 Cong. Rec. 2974. The instant case is precisely analogous to the former situation.

In addition, 23 D.C. Code 112 provides that the sentence for an offense is to run consecutively to the sentence for other offenses unless the sentencing court otherwise provides. In any event, petitioner has made no post-judgment request to the sentencing judge to correct the alleged error, a course that will remain open even if this Court denies certiorari. See Rule 35(a), D.C. Super. Ct. Crim. R.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA

v.

JOSEPH GREEN

MEMORANDUM ORDER

Criminal No. 34750-72

In this multiple-count indictment case, the Government alleges a pattern of false advertising in violation of D.C. Code provision, Title 22, Section 1411.[1]

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[1]Sec. 22-1411. Fraudulent advertising.

"It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse, receipt, or any security, or with the purpose to deceive, mislead, or induce any person, firm, association or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm association, or corporation so advertising such services. May 29, 1916, ch. 130, Sec. 1, 39 Stat. 165."

The defense has sought pre-trial dismissal of the action on varying grounds. Of interest is the challenge to the fact that defendant was indicted by a grand jury rather than charged by information as provided by statute.[2]

It has generally been held that misdemeanors may be prosecuted by indictment, *United States* v. *Knapf,* 180 F. Supp. 886 (D.C.N.J. 1960). More importantly, the question to be answered is whether defendant has suffered any prejudice or disadvantage in having this matter presented to a grand jury in lieu of information. This Court can find no prejudice; indeed it would appear that his rights were more fully protected.

At a non-jury trial the evidence showed that from February 1, 1972 through March 31, 1972, inclusive, advertising was published in The Washington Post Newspaper which offered sewing machines for sale by Freight Liquidators at a price of $63.00. The machines were described as being "Touch-N-Stitch" models capable of performing numerous sewing functions. Twenty-five year guarantees were stated.

The advertisements invariably represented a liquidation sale with drastic price reductions, of limited supply for a limited time.

The uncontradicted testimony of several purchasers was that, in response to the advertising, they were sold

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[2]Sec. 22-1412. Prosecution under section 22-1411.

"Prosecution under section 22-1411 shall be in the District of Columbia Court of General Sessions upon information filed by the United States Attorney for the District of Columbia, or one of his assistants. May 29, 1916, ch. 130, Sec. 2, 39, Stat. 165; Apr. 1, 1943, ch. 207. Sec. 1, 56, Stat. 190; June 25, 1948. ch. 464, Sec. 1, 62 Stat. 909; July 8, 1963, Pub. L. 88-60, Sec. 1, 77 Stat. 77."

the motor component of a sewing machine (often referred to as the "head"), exclusive of the base or foot pedal or any other means conventionally used to operate a sewing machine.

One witness stated she did not discover the deficiency until she inspected her purchase at home, she returned to the store and, at additional cost, obtained the necessary component in order to operate her machine.

Other witnesses stated they responded to the advertisement expecting to buy a complete machine and learned belatedly at the store that they would be required to pay additional monies for a complete operative unit.

Applying the standards of the statute to the circumstances of this case, it is seen that the Government must prove beyond a reasonable doubt that the defendant:

(1) Knowingly.

(2) inserted or caused to be inserted in a newspaper or publication in the District of Columbia,

(3) false, untrue or misleading statements or advertising,

(4) with intent to sell or barter goods or merchandise.

The defense contends that the evidence with respect to the insertion of the advertising into the newspaper is insufficient. It is true that the Government did not produce business records from the newspaper involved. However, the defendant admitted in hearings before the Federal Trade Commission that he was in charge of advertising in his business. More explicitly, in testifying before the grand jury, defendant unequivocally acknowledged his responsibility for the advertising under consideration. Defendant's own witness, Mr. Cunningham, testified that

defendant Green was the chief executive of Freight Liquidators and that he, himself, had come to Washington from Florida to observe his merchandising techniques. This chain of circumstances is compelling on this question.

Clearly the advertisements displayed to the public were misleading, untrue and false. In short, an operative sewing machine was advertised for sale, when in fact, only a component part was tendered for purchase.

In addition to the failure to produce the item advertised, the evidence showed a consistent and deliberate pattern —in all of the associated stores—of down-grading the advertised merchandise in favor of products not advertised.

Neither the warranty nor the instruction booklet extended by the manufacturer would be applicable to the "head" component of the machine as offered by the defendant. And, of course, it could not be safely operated as such.

Accordingly, the Court finds:

(1) That during the period alleged, the defendant knowingly caused certain advertisements to be inserted in The Washington Post Newspaper.

(2) That the advertising was false, untrue and misleading, in that, it purported to describe and offer for sale, a complete sewing machine unit, although no such unit was tendered for purchase at the advertised price; it was also misleading in that the true purpose of the advertisement was not to sell the merchandise advertised, but rather to sell items not advertised.

(3) That defendant utilized such false advertising with intent to sell certain goods to the public.

(4) That defendant did all of the above acts purposefully, deliberately, and intentionally.

It is concluded that the government has carried its burden and proven each element of the offense charged.

The defendant is found guilty as charged.

WILLIAM C. PRYOR
Judge

OCTOBER 4, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1553

JOSEPH GREEN AND FREIGHT LIQUIDATORS, ETC.
Petitioner

v.

UNITED STATES, *Respondent*

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OCTOBER TERM, 1974

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Petitioner

v.

UNITED STATES, *Respondent*

PETITION FOR REHEARING

Petitioner prays that this Court grant a rehearing in the above entitled matter. This Court denied certiorari on October 15, 1974.

QUESTION PRESENTED

Should not this Court grant rehearing on whether the petitioner can be validly sentenced for each day of a sixty day period that an allegedly false advertisement

was published in the Washington Post in light of the fact that this Court has granted certiorari to the United States in *United States* v. *ITT Continental Baking Company,* No. 73-1290, wherein this Court will decide whether the trial court and appellate court were correct in holding that daily civil penalties could not be imposed and the question construed as a continuing violation of a consent order of the Federal Trade Commission under Title 15 USC, 21L, 45L.

STATEMENT OF THE CASE

The petitioner caused an advertisement to be inserted in The Washington Post which ran for sixty days. The petitioner was charged with the violation of Title 22, Sec. 1411 of the District of Columbia Code which prohibits false advertising. Section 22, 1413 of the District of Columbia Code defines the offense as a petty offense by imposing a maximum penalty of $500 and sixty days in jail. The Superior Court and the District of Columbia Court of Appeals have to this moment, unless rehearing is granted by this Court, allowed the offense to *be treated as a continuing offense for each day the article appeared in the paper.* In so doing they have converted a petty offense in punishment terms into a felony by artifically treating each day of the sixty days as a separate independent offense for which a separate penalty could be assessed. This Court denied certiorari on October 15, 1974. This petition for rehearing is filed in light of this Court's granting of certiorari in *United States* v. *ITT Continental Baking Company,* No. 73-1290, which deals with whether a course of conduct is a continuing one for which separate civil penalties can be assessed or whether it is one violation for which one penalty may be assessed.

ARGUMENT

We feel that this Court's grant of certiorari in *United States* v. *ITT Continental Baking Company,* No. 1290, which will decide whether the Courts were justified in refusing to impose daily civil penalties against the respondent for allegedly violating over a period of time a consent order of the Federal Trade Commission when they held it constituted a single violation for which only one penalty could be imposed should induce this Court to grant rehearing in this case. This Court should decide whether it comports with due process of law to allow the Government to convert a petty offense, Title 22, Sec. 1411, which has a maximum penalty of sixty days in jail or $500, into an offense of major proportions and in effect transform it from an imprisonment point of view to a felony statute by the simple expedient of construing each day's publication in The Washington Post as a separate offense.

It would appear that resolution of this issue by the Court in this case will have direct bearing on the reasoning and determination of whether daily civil penalties could be imposed in *United States* v. *ITT Continental Baking Company, supra.* Even if this Court ultimately sees fit not to review the total merits of the petitioner's petition for certiorari, under this Court's rulings in *United States* v. *C.I.T. Corporation,* 344 U.S. 218, Sup. Ct. 277, and *Ladner* v. *United States* 358 U.S. 169, 79 S.Ct. 209, this Court should grant review with respect to the sentence imposed in this case. The present sentence imposing a prison term of over three years and/or a fine of $22,800.00 *defies reason and common sense in allowing a petty offense to be escalated into the punishment of a felony*

by the invocation of the concept that for each day the article appeared in the paper a separate and independent crime was committed.

This view fully accords with the settled principle that statutes should be construed to avoid unfairness or oppression, e.g., *Carlisle* v. *United States,* 83 U.S. (16 Wall.) 147 (1872), and this canon has been followed even in cases where the statutory language did not easily comport with such a solution. This Court has held that a penalty may not be imposed where the Government standard is such

> "That men of common intelligence must necessarily guess at its meaning and differ as to its application. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961) quoting from, *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). See also *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966).

The statute must be given a construction comporting with common sense. The sentence imposed herein making each day the article appeared in the paper a separate offense for which a consecutive sentence could be imposed does violence to due process and in fact constitutes cruel and unusual punishment.

Respectfully submitted,

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Baileys Crossroads, Va. 22041
Counsel for Petitioner

Certificate of Good Faith

I, Albert J. Ahern, Jr., being a member of the Bar, do hereby certify that the above Petition for Rehearing is filed in good faith and raises an issue that counsel does not feel has been gleaned from the original petition, and not for the purposes of delay.

ALBERT J. AHERN, JR.